BEFORE THE FEDERAL COMMUNICATIONS
WASHINGTON, D.C. 20554

In the Matter of:
Policy and Rules Concerning the Interstate, Interexchange Marketplace — FCC 96-123
Implementation of Section 254(g) of the Communications Act of 1934, as amended — CC Docket No. 96-61

COMMENTS OF THE TENNESSEE ATTORNEY GENERAL

We believe the geographic and detariffing issues presented by the FCC in the NPRM warrant comment. The time period for review and response was short and we would like time to submit additional comments. With this in mind we supply the following comments for your consideration.

The issues we address are:

1. Whether long distance companies should be subject to geographic rate averaging rule? Our comment is yes. We also believe that geographic rate averaging is not sufficient for addressing the uniqueness of and that BOC's should be subject to a presumption of market power in their primary service region until the FCC determines otherwise.

2. Whether there should be a forbearance from long distance tariff filing? Our comment is no. The filing of tariffs provide important regulatory and consumer benefits. For example, tariffs provide a basis for calculating consumer refunds in slamming cases, evaluating fraudulent advertising, stopping and preventing, misleading, deceptive practices and outright theft. Moreover, we do not believe that administrative burden is a permissible factor in the forbearance

decision and tariff filing is less expensive than individual consumer notices.

A side issue is whether the FCC has authority to reverse a forbearance? Our comment is that there is no explicit grant of authority in the Act allowing the FCC to reverse a forbearance.

3. If long distance companies are permitted to bundle equipment with their sale of services, the company should be required to sell its long distance service alone to any comparable consumer at its price contribution to the bundled rate, even if there is no equipment bundling. Our comment is yes. Requiring an equipment purchase would burden the consumers decision and adversely effect low income consumers.

We provide some additional explanation, by number, below.

1. We believe all companies offering interexchange service should be subject to a Commission rule on interstate geographic rate averaging. The mere adoption of the rule will not be a panacea if current market conditions are an accurate indicator.

The FCC articulates in paragraph 45 of the NPRM that market power exists when a "...monopolist...' could increase its rates for service in a region by a small, significant, nontransitory amount and still remain profitable."[1] We believe the FCC should take judicial notice that AT&T is demonstrating that a company can remain profitable by expressly engaging in this type of market power behavior.

AT&T regularly and clearly **advertises** that **its (AT&T) services are priced higher than its competitors**. It has profitably conducted this campaign for years. It is difficult to imagine any more explicit, or express, statement and demonstration that a company can

[1]We are uncertain whether the FCC's definition of "monopoly" is a classical definition of monopoly and includes any organization with market power.

profitably engage in price increases and still remain profitable.

Although the Commission currently requires geographic rate averaging the AT&T situation shows that geographic rate averaging alone is not sufficient to prevent market exploitation through higher prices by a company with market power.

We also agree with the premise of paragraph 53 of the NPRM that the BOC's market power within their region may be such that evaluating their market power on a nationwide basis may be insufficient and misleading. We believe that there should be a presumption that BOC's have market power in their primary local service region. Such a rule would minimize consumer harm. As a result, a rule covering regional geographic rate averaging and national geographic rate averaging is appropriate.

2. The FCC **should not** forebear from interstate, interexchange tariff filing.

A. Tariffs provide a basis for calculating consumer refunds in slamming cases, evaluating fraudulent advertising and stopping misleading, deceptive practices and outright theft. We incorporate by reference the arguments, position and harms expressed by the National Association of Attorneys General in its Motion for Reconsideration, CC Docket No. 94-129, Dated August 11, 1995. Detariffing service providers will exacerbate the harm to consumers and the difficulty of protecting them.

B. AT&T is the largest interexchange carrier. We therefore incorporate our comment in number 1 above into this comment. In this regard, AT&T expressly demonstrates, in its national advertising, that it can profitably charge higher prices than the competition for the same service. It therefore graphically demonstrates that "competition" is not sufficient for regulating the market place. As a result, forbearance from tariff filing is not warranted.

Moreover, neither the FCC nor any one knows what the behavior of AT&T will be when the time limits on any "voluntary" agreements expire. We believe the FCC should defer all forbearance decisions until there is consistent, objective proof that a "classically competitive" marketplace exists and that it will be self regulating in a manner which does not harm consumers.

C. We have not identified an explicit grant of authority in the Act for the FCC to reverse a forbearance. Previously the FCC sought to implement forbearance by rule. The Courts held that the FCC did not have such authority. Similarly the FCC may not have authority to reverse a forbearance. We believe the FCC should assure that it can reverse a forbearance before it grants any. Whether the FCC has authority to reverse forbearance is a significant, and material issue when its forbearance decisions will affect the several states.

The current wave of mergers and agreements suggest that the telecommunications business is consolidating, creating fewer companies with greater market power. These mergers create such uncertainty about the marketplace and effective competition that the FCC should defer its decision on forbearance to well after the statutory time constraints on the companies ability to joint market and manufacture expires. Therefore, the FCC may not be postured in a manner to prevent great economic harm arising from forbearance if it cannot reverse them.

D. Tariff's provide consumers with notice of the price of services and a basis for comparison. Without tariffs the telecommunications business becomes a series of ***caveat emptor*** transactions for consumers. A reversion to contract law does not greatly benefit the residential consumer because the cost of judicial relief can easily exceed the cost of the injury. The harm posed by this cost outweighs the "tacit collusion" potentialities of the marketplace.

We also believe that detariffing does not prevent or even reduce the possibility of tacit collusion. There are simply too many ways for companies to obtain pricing information. In addition, the publication of a tariff has no import when a market moves closer to classical competition. For example, airline industry competition with reductions in pricing occurs, despite the publication of prices, in markets where there is sufficient and effective competition. The evidence of tacit collusion is merely a symptom reinforcing the concept that competition is not sufficient and regulation is appropriate.

E. There are better ways to handle the tacit collusion problem. One way might be to require tariff filing for price increases but none for price decreases. Under this method the bundled and unbundled costs and prices of services would be determined and the bundled retail price(s) would equal the price cap. No tariff would be filed if the company charges prices equal to or less than the price cap. Tariffs would be filed and would have to be justified for increases exceeding the cap. If the cap needed to be moved upward because of valid, specific, environmental changes appropriate for inclusion in ratemaking, the adjustments could be made in four year intervals.

F. The problems with the filed rate doctrine create less harm and burdens to competition than the adhesion contracts the telecommunications industry appears to favor. These adhesion contracts appear to be uniformly standard in the cellular industry and in the absence of regulatory protections and are likely to become the standard mechanism for managing the customer/company relationship in the absence of tariffs. We do not believe a showing can be made that the adhesion contracts create superior incentive to use the communications network or that it is in the public interest to have them.

3. We do not have a comment on equipment bundling, *per se*. However, we believe an otherwise qualified purchaser of a telecommunications service should be able to purchase the actual telecommunications services at the bundled rate. whether or not the equipment is purchased. Requiring an equipment purchase places a burden on the propensity to communicate, contrary to the stated purposes of the Act. Moreover, the absence of a tariff will prevent the consumer for ascertaining the telecommunications charge.

Conclusion

For the reasons stated above we believe that the FCC should not implement a forbearance on tariff filing. The FCC has premised its actions on a proceeding determined to be in excess of its statutory authority at the time. Moreover, the legal standard used by the Commission was different than the legal standard expressed in the 1996 Act. As a result its reliance on its prior decision appears misplaced and should not constitute a basis for its forbearance decision. Forbearance is premature and the decision should be deferred until the Commission has an objectively accurate picture of the marketplace.

Respectfully Submitted,

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